PROPERTY LAW: 1993-1994

VOLUME ONE: INTRODUCTORY MATERIALS AND FUNDAMENTALS OF REAL PROPERTY LAW

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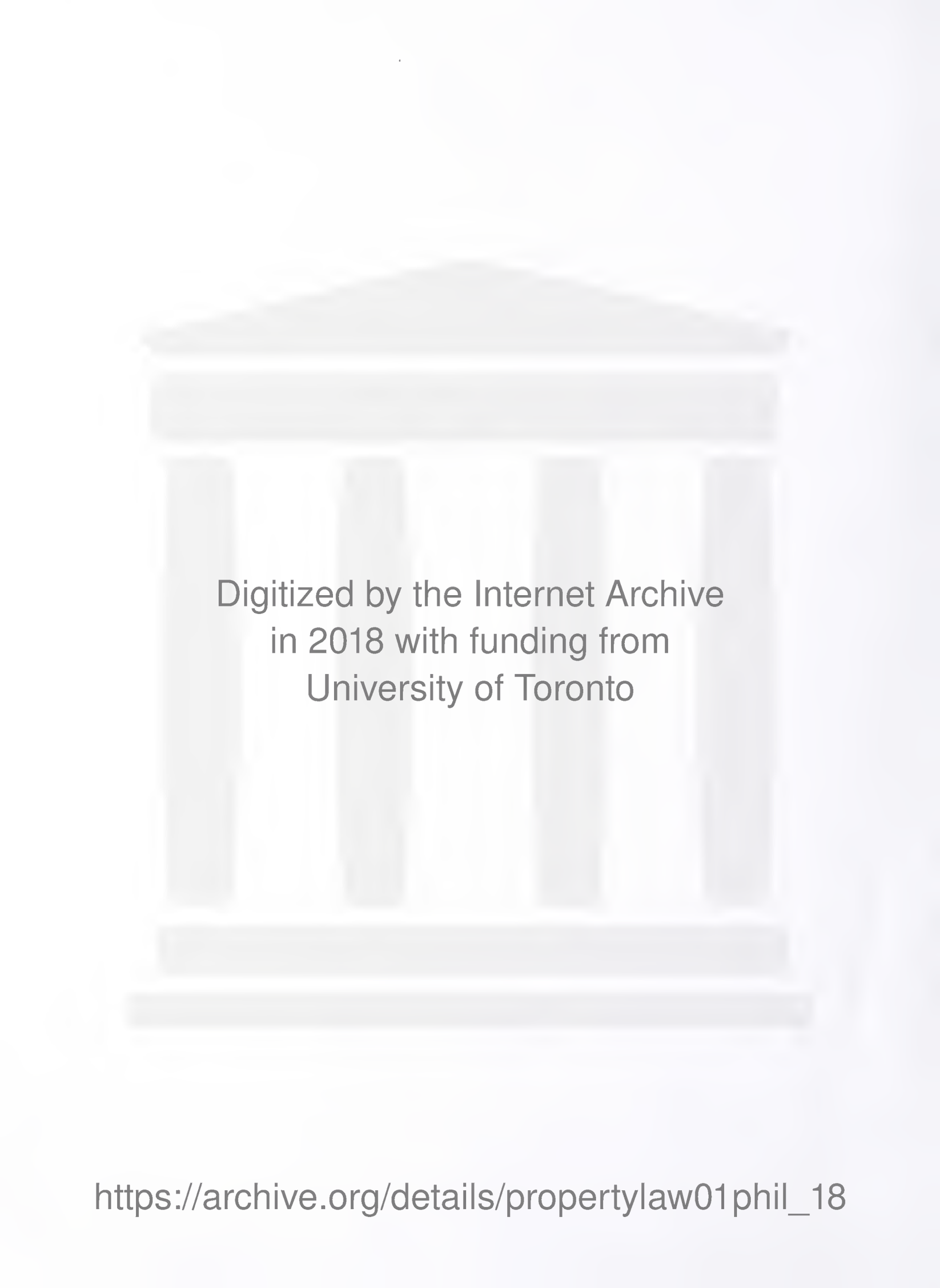

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CHAPTER ONE: WHAT IS PROPERTY?

(a) Introduction

C.B. Macpherson, Property: Mainstream and Critical Positions (Toronto, 1978).

1 / PROBLEMS OF CHANGE

The meaning of property is not constant. The actual institution, and the way people see it, and hence the meaning they give to the word, all change over time. We shall see that they are changing now. The changes are related to changes in the purposes which society or the dominant classes in society expect the institution of property to serve.

When these expectations change, property becomes a controversial subject: there is not only argument about what the institution of property ought to be, there is also dispute about what it is. For when people have different expectations they are apt to see the facts differently. The facts about a man-made institution which creates and maintains certain relations between people - and that is what property is - are never simple. Since the institution is man-made, it is assumed to have been made, and to be kept up, for some purpose: either (or both) to serve some supposed essentially human needs, which would determine (at least the limits of) what the institution is; or to meet the wants of the classes which from time to time have set up the institution or have reshaped it, that is, have made it what it is. In either case, those who see the purpose differently will see the thing differently.

How people see the thing - that is, what concept they have of it - is both effect and cause of what it is at any time. What they see must have some relation (though not necessarily an exact correspondence) to what is actually there; but changes in what is there are due partly to changes in the ideas people have of it. This is simply to say that property is both an institution and a concept and that over time the institution and the concept influence each other.

Before turning to some of the controversial works of leading modern writers it will be helpful to try to take a preliminary general view. Can anything of general validity be said about what property is? Not very much, for the reasons just stated. It is not easy to define a changing and purposeful concept like property. But something more can be said. If we address ourselves to certain difficulties which are peculiar to this concept we may see our way to some firm ground.

One obvious difficulty is that the current common usage of the word 'property' is at variance with the meaning which property has in all legal systems and in all serious treatments of the subject by philosophers, jurists, and political and social theorists. In current common usage, property is *things*; in law and in the writers, property is not things but *rights*, rights in or to things. We shall see that the current common usage is the product of some particular historical circumstances, and that it is already growing obsolete.

Another difficulty is that property, in the works of most modern writers, is usually treated as identical with *private* property, an *exclusive* individual right, my right to exclude you from some use or benefit of something. This usage, like the other, can be seen as the product of a particular set of historical circumstances.

I shall argue that both these usages are misusages. They are of unequal importance. The one is merely a popular misuse of the word: it does not necessarily carry with it a misunderstanding, although it may be taken as a sign of a limited understanding, of what property is. The other one is more serious. It is a genuine misconception, which affects the whole theoretical handling of the concept of property by many modern writers. Both usages can be traced historically to about the same period, the period of the rise of the full capitalist market society. These coincidences give us a clue as to how both usages arose.

And when this is followed up we shall be able to see why each is now becoming, or is likely to become, obsolete.

Before investigating the sources of these usages we may state the *prima facie* case that each is a misusage. I shall show (in section 2) that property both in law and in logic means rights, not things; and (in section 3) that the concept of property cannot logically be confined to private property. Then (in section 4) I shall show how the current common misusage arose and why it is now becoming obsolete, and (in section 5) how the more serious misusage arose and why it is likely to become obsolete. Then (in section 6) I shall show why there is always a need for justificatory theories of property, and why they generally include both property in the consumable means of life and property in land and capital and labour.

As soon as any society, by custom or convention or law, makes a distinction between property and mere physical possession it has in effect defined property as a right. And even primitive societies make this distinction. This holds both for land or flocks or the produce of the hunt which were held in common, and for such individual property as there was. In both cases, to have a property is to have a right in the sense of an enforceable claim to some use or benefit of something, whether it is a right to a share in some common resource or an individual right in some particular things. What distinguishes property from mere momentary possession is that property is a claim that will be enforced by society or the state, by custom or convention or law.

If there were not this distinction there would be no need for a concept of property: no other concept than mere occupancy or momentary physical possession would be needed. No doubt it is for this reason that philosophers, jurists, and political and social theorists have always treated property as a right, not a thing: a right in the sense of an enforceable claim to some use or benefit of something.

This is not to say that all of the theorists have approved of the set of rights existing in their society. In recognizing that property consists of actual rights (enforceable claims) they do not necessarily endorse the existing rights as morally right. They have, on the contrary, often argued that the existing set of rights (enforceable claims) is not morally right, and that a different set of rights should be installed. In doing so, they are simply arguing that a different set of claims ought to be made enforceable: they are not questioning that property consists of enforceable claims.

Moreover, in saying that serious theorists have always held property to be a right in the sense of an enforceable claim, I do not mean to imply that they have thought, or that anyone now does think, that the right rests on nothing more than the threat of force. On the contrary, the threat of force is invoked only as an instrument that is thought to be necessary to guarantee a right that is held to be basic. The perennial justification of any institution of property is that property ought to be an enforceable claim because property is necessary for the realization of man's fundamental nature, or because it is a natural right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim only because and in so far as the prevailing ethical theory holds that it is a necessary human right.

With these qualifications then - that to see property as a right does not imply approving of any particular system of property as morally right, and that to define the actual right as an enforceable claim does not imply that force justifies the right - we may re-assert our original point: the concept of property is, historically and logically, a concept of rights in the sense of enforceable claims. For reasons we shall see (in section 4), popular usage has departed from this concept in the last few centuries; we shall also see that this departure appears to be temporary.

We may notice here one logical implication of the definition of property as an enforceable claim: namely, that property is a political relation between persons. That property is *political* is evident. The idea of an enforceable claim implies that there be some body to enforce it. The only body that is extensive enough to enforce it is a whole organized society itself or its specialized organ-

ization, the state; and in modern (i.e., post-feudal) societies the enforcing body has always been the state, *the* political institution of the modern age. So property is a political phenomenon. That property is a political *relation* between persons is equally evident. For any given system of property is a system of rights of each person in relation to other persons. This is clearest in the case of modern private property, which is my right to exclude you from something, but it is equally true of any form of common property, which is the right of each individual not to be excluded from something.

3 / COMMON PROPERTY, PRIVATE PROPERTY, STATE PROPERTY

The definition of property as an enforceable claim *of a person* to some use or benefit of something is often taken to rule out the idea of *common* property. But a little analysis will show that it does not.

Society or the state may declare that some things - for example, common lands, public parks, city streets, highways - are for common use. The right to use them is then a property of individuals, in that each member of the society has an enforceable claim to use them. It need not be an unlimited claim. The state may, for instance, have to ration the use of public lands, or it may limit the kinds of uses anyone may make of the streets or of common waters (just as it now limits the uses anyone may make of his private property), but the right to use the common things, however limited, is a right of individuals.

This point needs some emphasis, for it can easily be lost sight of. The fact that we need some such term as 'common property,' to distinguish such rights from the exclusive individual rights which are private property, may easily lead to our thinking that such common rights are not individual rights. But they are. They are the property of individuals, not of the state. The state indeed creates and enforces the right which each individual has in the things the state declares to be for common use. But so does the state create and enforce the exclusive rights which are private property. In neither case does the fact that the state creates the right make the right the property of the state. In both cases what is created is a right of individuals. The state *creates* the rights, the individuals *have* the rights. Common property is created by the guarantee to each individual that he will not be excluded from the use or benefit of something; private property is created by the guarantee that an individual can exclude others from the use or benefit of something. Both kinds of property, being guarantees to individual persons, are individual rights.

In the case of private property the right may, of course, be held by an artificial person, that is, by a corporation or an unincorporated grouping created or recognized by the state as having the same (or similar) property rights as a natural individual. The property which such a group has is the right to the use and benefit, and the right to exclude non-members from the use and benefit, of the things to which the group has a legal title. Corporate property is thus an extension of individual private property.

Both the kinds of property we have noticed so far are thus, directly or by extension, individual rights. Both are rights of distinct natural or artificial persons. We have now to notice that there is another kind of property which appears not to be an individual right at all. This may be called 'state property': it consists of rights which the state has not only created but has kept for itself or has taken over from private individuals or corporations. The right to use the airwaves for radio and television communication, for instance, may be retained wholly or partially by the state, as it is in countries with publicly owned and operated broadcasting systems. Again, various enterprises, e.g., railways and airlines, are in many countries owned by the state. The rights which the state holds and exercises in respect of these things, the rights which comprise the state's property in these things, are akin to private property rights, for they consist of the right to the use and benefit, and the right to exclude others from the use and benefit, of something. In effect, the state itself is taking and exercising the powers of a corporation: it is acting as an artificial person.

Now state property, as just described, does not give the individual citizen a direct right to use, nor a right not to be excluded from, the assets held by the state acting as a corporation. Air France and British Railways are not freely available to all the citizens of those countries; a state-owned railway is apt to be as jealous of its property as is a privately owned one. State property, then, is not common property as we have defined it: state property is not an individual right not to be excluded. It is a corporate right to exclude. As a corporate right to exclude others it fits the definition of (corporate) private property.

It may seem paradoxical to call it a kind of private property, for by definition it is the property of the whole state. The paradox disappears when we notice that the state, in any modern society, is not the whole body of citizens but a smaller body of persons who have been authorized (whether by the whole body of citizens or not) to command the citizens. Although Idealist philosophers, in order to emphasize their belief that every state ought to be (or that the good or true state is) a community of all the citizens, may define the state as a community of all, political realists have always seen that the state is in fact the persons who are acknowledged by the citizens to have the right to command them. This was more obviously true of the state before the rise of democracy - Louis XIV could say, not unrealistically, 'l'état, c'est moi' - but it is just as true of democratic states: the body of persons that is authorized by the citizens in a democracy is not the whole body of citizens. It acts in their name, but it is not they. And *it* is the body that holds the rights called state property. When the state is seen in this way, it becomes perfectly intelligible that the state can have a corporate right to exclude others, including citizens, from the use or benefit of something, in just the same way as it permits a private owner to do.

State property, then, is to be classed as corporate property, which is exclusive property, and not as common property, which is non-exclusive property. State property is an exclusive right of an artificial person.

Two points emerge from this analysis of the three kinds of property. One is that all three kinds - common, private, and state property - are rights of persons, either natural individuals or artificial persons. The other is that common property, rather than being ruled out by the very concept of property as rights (enforceable claims) of persons, turns out to be the most unadulterated kind of property. For common property is always a right of the natural individual person, whereas the other two kinds of property are not always so: private property may be a right of either a natural or an artificial person, and state property is always a right of an artificial person.

In the light of this analysis it is apparent that the concept of property as enforceable claims of persons to some use or benefit of something cannot logically be confined to exclusive private property.

Having now seen, in this and the preceding section, that property is rights, not things, and that property cannot logically be confined to private property, we are ready to enquire how these two misconceptions arose, and how transient they are likely to be.

4 / THE MISCONCEPTION OF PROPERTY AS THINGS

In current ordinary language, property generally means things. We commonly refer to a house, a plot of land, a shop, as a property. We advertise 'Properties for Sale' and 'Properties to Let.' What the advertisement describes as being for sale or for rent is the building and the land it stands on. But in fact what is offered, and what constitutes the property, is the legal title, the enforceable ex-

clusive right, to or in the tangible thing. This is more obvious in the case of a lease, where the right is to the use of the thing for a limited period and on certain conditions, than in the case of an outright sale, but in both cases what is transferred is an enforceable exclusive right.

Yet we still speak of property as the thing itself. How did this current usage begin, and how long is it likely to last? It began late in the seventeenth century, and it is not likely to outlast the twentieth.

In ordinary English usage, at least through the seventeenth century, it was well understood that property was a right in something. Indeed, in the seventeenth century, the word property was often used, as a matter of course, in a sense that seems to us extraordinarily wide: men were said to have a property not only in land and goods and in claims on revenue from leases, mortgages, patents, monopolies, and so on, but also a property in their lives and liberties. It would take us too far afield to try to trace the source of that very wide use of the term, but clearly that wide sense is only intelligible while property *per se* is taken to be a right not a thing.

And there were good reasons then for treating property as the right not the thing. In the first place, the great bulk of property was then property in land, and a man's property in a piece of land was generally limited to certain uses of it and was often not freely disposable. Different people might have different rights in the same piece of land, and by law or manorial custom many of those rights were not fully disposable by the current owner of them either by sale or bequest. The property he had was obviously some right in the land, not the land itself. And in the second place, another substantial segment of property consisted of those rights to a revenue which were provided by such things as corporate charters, monopolies granted by the state, tax-farming rights, and the incumbency of various political and ecclesiastical offices. Clearly here too the property was the right, not any specific material thing.

The change in common usage, to treating property as the things themselves, came with the spread of the full capitalist market economy from the seventeenth century on, and the replacement of the old limited rights in land and other valuable things by virtually unlimited rights. As rights in land became more absolute, and parcels of land became more freely marketable commodities, it became natural to think of the land itself as the property. And as aggregations of commercial and industrial capital, operating in increasingly free markets and themselves freely marketable, overtook in bulk the older kinds of moveable wealth based on charters and monopolies, the capital itself, whether in money or in the form of actual plant, could easily be thought of as the property. The more freely and pervasively the market operated, the more this was so. It appeared to be the things themselves, not just rights in them, that were exchanged in the market. In fact the difference was not that things rather than rights in things were exchanged, but that previously unsaleable rights in things were now saleable; or, to put it differently, that limited and not always saleable rights *in* things were being replaced by virtually unlimited and saleable rights *to* things.

As property became increasingly saleable absolute rights to things, the distinction between the right and the thing was easily blurred. It was the more easily blurred because, with these changes, the state became more and more an engine for guaranteeing the full right of the individual to the disposal as well as use of things. The state's protection of the right could be so much taken for granted that one did not have to look behind the thing to the right. The thing itself became, in common parlance, the property.

This usage, as we have seen, is still with us today. But meanwhile, from about the beginning of the twentieth century the preponderant nature of property has been changing again, and property is again beginning to be seen as a right to something: now, more often than not, a right to a revenue rather than a right to a specific material thing.

The twentieth century change is twofold. First, the rise of the corporation as the dominant form of business enterprise has meant that the dominant form of property is the expectation of revenue. The market value of a modern corporation consists not of its plant and stocks of materials but of its presumed ability to produce a revenue for itself and its shareholders by its organization of skills and its manipulation of the market. Its value as a property is its ability to produce a revenue. The property its shareholders have is the right to a revenue from that ability.

Secondly, even in the countries most devoted to the idea of free enterprise and the free market, a sharply increasing proportion of the individual's and the corporation's rights to any revenue at all depends on their relation to the government. When the right to practise a trade or profession depends on state-authorized licensing bodies and on judicial interpretations of their powers; when the right to engage in various kinds of enterprise depends on legislative enactments and administrative and judicial rulings; when the right to a pension or social security payments and the like depends on similar rulings; and when the earnings of a corporation depend more on what it can get, both by way of government contracts and by way of legislation favourable to its own line and scale of business, than on the free play of the market: then the old idea of property as things becomes increasingly unrealistic.

Property for the most part becomes, and is increasingly seen to become, a right – a somewhat uncertain right that has constantly to be re-asserted. It is the right to an income.

We may conclude, from this sketch of the changing content of private property, that the notion of property as things is on its way out and that it is being superseded by the notion of property as a right to an income. But this will still leave the more basic misconception, that property means exclusive private property: all the examples of new kinds of property we have noticed are examples of private property; in all of them, property is seen as the right of an individual or a corporation to an income for his or its exclusive benefit.

5 / THE MISCONCEPTION OF PROPERTY AS PRIVATE PROPERTY

This misconception may, as we have just seen, be left intact with the disappearance of the more superficial misconception that property is things. But it too may be on its way out, for pressures on it are developing. It will probably take longer to disappear: not because, as one might think at first glance, it has a longer history, but because it is more needed by a market society.

Although concern about private (i.e., exclusive) property goes back to the earliest theory, the identification of property with private property does not go back much farther than the seventeenth century. It is true that from the beginning – and argument about property is as old as political theory itself – the argument was mainly about private property. This is not surprising, since it is only the existence of private property that makes property a contentious moral issue. In any case, the earliest extant theorizing about property was done in societies which did have private property. But those societies were also familiar with common property. So, while the argument was mainly about private property, the theorists did not equate it with property. Aristotle could talk about two systems of property, one where all things were held in common and one where all things were held privately, and about mixed systems where land was common but produce was private and where produce was common but land was private: all these he saw as systems of property.

From then on, whether the debate was about the relative merits of private versus common property, or about how private property could be justified or what limits should be put on it, it was private property that bulked largest in the debate. It was attacked by Plato as incompatible with the good life for the

ruling class; defended by Aristotle as essential for the full use of human faculties and as making for a more efficient use of resources; denigrated by earliest Christianity; defended by St Augustine as a punishment and partial remedy for original sin; attacked by some heretical movements in mediaeval (and Reformation) Europe; justified by St Thomas Aquinas as in accordance with natural law, and by later mediaeval and Reformation writers by the doctrine of stewardship. In all that early controversy, stretching down through the sixteenth century, what was chiefly in question was an exclusive, though a limited or conditional, individual right in land and goods.

But in that early period the theorists, and the law, were not unacquainted with the idea of common property. Common property was, by one writer or another, advocated as an ideal, attributed to the primitive condition of mankind, held to be suitable only to man before the Fall, and recognized as existing alongside private property in such forms as public parks, temples, markets, streets, and common lands. Indeed, Jean Bodin, the first of the great early modern political theorists, in making a strong case at the end of the sixteenth century for modern private property, argued that in any state there must also be some common property, without which there could be no sense of community and hence no viable state; part of his case for private property was that without it there could be no appreciation of common property.

It is only when we enter the modern world of the full capitalist market society, in the seventeenth century, that the idea of common property drops virtually out of sight. From then on, 'common property' has come to seem a contradiction in terms.

That it has done so can be seen as a reflection of the changing facts. From the sixteenth and seventeenth centuries on, more and more of the land and resources in settled countries was becoming private property, and private property was becoming an individual right unlimited in amount, unconditional on the performance of social functions, and freely transferable, as it substantially remains to the present day.

Modern private property is indeed subject to certain limits on the uses to which one can put it: the law commonly forbids using one's land or buildings to create a nuisance, using any of one's goods to endanger lives, and so on. But the modern right, in comparison with the feudal right which preceded it, may be called an absolute right in two senses: it is a right to dispose of, or alienate, as well as to use; and it is a right which is not conditional on the owner's performance of any social function.

This of course was exactly the kind of property right needed to let the capitalist market economy operate. If the market was to operate fully and freely, if it was to do the whole job of allocating labour and resources among possible uses, then all labour and resources had to become, or be convertible into, this kind of property. As the capitalist market economy found its feet and grew, it was expected to, and did, take on most of this work of allocation. As it did so, it was natural that the very concept of property should be reduced to that of *private* property - an exclusive, alienable, 'absolute' individual or corporate right in things.

Now, however, the facts are changing again. Even in the most capitalist countries, the market is no longer expected to do the whole work of allocation. The society as a whole, or the most influential sections of it, operating through the instrumentality of the welfare state and the warfare state - in any case, the regulatory state - is doing more and more of the work of allocation. Property as exclusive, alienable, 'absolute' individual or corporate rights in things therefore becomes less necessary.

This does not mean that this kind of property is any less desired by the corporations and individuals who still have it in any quantity. But it does mean that as this kind of property becomes less demonstrably necessary to the work of allocation, it becomes harder to defend this kind as the very essence of property. Again, no one would suggest that the removal or reduction of the necessity of this kind of property would by itself result in the disappearance or weakening of this as the very image of property: positive social pressures would also be required.

Positive social pressures against this image of property are now developing, as a fairly direct result of the unpleasant straits to which the operation of the market has brought the most advanced societies. The most striking of these pressures comes from the growing public consciousness of the menaces of air and water pollution. Air and water, which hitherto had scarcely been regarded as property at all, are now being thought of as common property - a right to clean air and water is coming to be regarded as a property from which nobody should be excluded.

So the identification of property with exclusive private property, which we have seen has no standing in logic, is coming to have less standing in fact. It is no longer as much needed, and no longer as welcomed, as it was in the earlier days of the capitalist market society. I return to this point in the final essay of this volume.

6 / THE NEED FOR JUSTIFICATORY THEORIES

We may conclude this part of our analysis by emphasizing a point that was implicit in what was said at the very beginning about property being a controversial subject. Property is controversial, I have said, because it subserves some more general purposes of a whole society, or the dominant classes of a society, and these purposes change over time: as they change, controversy springs up about what the institution of property is doing and what it ought to be doing.

The most general point is that the institution - any institution - of property is always thought to need justification by some more basic human or social purpose. The reason for this is implicit in two facts we have already seen about the nature of property: first, that property is a right in the sense of an enforceable claim; second, that while its enforceability is what makes it a *legal* right, the enforceability itself depends on a society's belief that it is a *moral* right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. This is simply another way of saying that any institution of property requires a justifying theory. The legal right must be grounded in a public belief that it is morally right. Property has always to be justified by something more basic; if it is not so justified, it does not for long remain an enforceable claim. If it is not justified, it does not remain property. . . .

The ultimate justification of any institution of property, of any variety of the property right, has always been the individual right to life - not merely to continued existence once born, but to a fully human life: a 'good' life, as idealist philosophers from Plato to T.H. Green would have it, or at least what materialist philosophers like Hobbes could summarize as 'commodious living.' This means, obviously, a right to a flow of the consumable things needed to maintain such a life. But serious thinkers soon saw that rights in what was needed to *produce* the means of life were even more important.

No doubt, the right to things needed to maintain life is in one sense the most basic: without a property in one's daily bread no other kind of property would be of any use. Yet the other kinds - the property in land and capital especially - are more important in another way: they carry with them, when they are held in quantities larger than an individual can work by himself, a power to control in some measure the lives of others. So property in land and capital stands in rather more need of justification than does simple property in the consumable means of life. And property in labour itself (labour being, in addition to land and capital, the other means of producing the means of life) is, as we shall see, deeply involved in the justification of any of the other kinds of property. For these reasons, theories of property, though they may start from a justification of property in things for consumption, have concerned themselves mainly with justifying (or attacking) property in land and capital and labour.